

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ADOBE SYSTEMS INCORPORATED,  
Plaintiff,  
v.  
A & S ELECTRONICS, INC., et al.,  
Defendants.

Case No. 15-cv-02288-SBA (EDL)

**ORDER REGARDING DOCKET NOS.  
85, 86, AND 87**

This is a case brought by Adobe against A&S Electronics and its President and CEO Alan Lin for trademark infringement, false designation of origin, dilution, copyright infringement, unfair business practices and breach of contract. According to Adobe, one of its investigators purchased an “Adobe Acrobat X Standard v. 10 for Windows – 1 User, 2 PCs (License Key Card Only- No Media)” online from A&S’ website TrustPrice.com. Adobe claims that the serial number for the product was a number for a product only to be sold in Asia, and the card itself was a counterfeit not manufactured by Adobe. SAC¶ 37. A&S defends on the basis that its sales are protected by the “first sale” doctrine, which generally provides that once a copyrighted work is lawfully sold or transferred, the new rightful owner has the right to sell or otherwise dispose of that copy without permission. The discovery cutoff was June 23, and Judge Armstrong’s scheduling order provided that “[t]he parties are responsible for scheduling discovery so that motions to resolve discovery disputes can be heard before the [June 23] discovery cutoff.” Dkt. No. 60 at 1.

This Court has previously resolved several discovery disputes, and recently issued an Order requiring the individual deposition of Mr. Lin to proceed and providing the parties with guidance and ordering them to further meet and confer regarding the scope of a 30(b)(6)

1 deposition of A&S. See Dkt. Nos. 78, 79, 80, 87. Additionally, the Court has set a phone  
2 conference set for July 8 to resolve a dispute over a subpoena that Adobe issued to Bank of  
3 America seeking financial records for accounts belonging to A&S, Mr. Lin and a related third  
4 party entity Spot.Me. See Dkt. Nos. 82, 83, 84, 88. Currently before the Court are three  
5 additional discovery letters addressing two separate disputes. See Dkt. Nos. 85, 86, 87.

6 **I. Timeliness**

7 On June 23, 2016, the discovery cutoff deadline, Adobe filed two unilateral letters seeking  
8 to: (1) compel the deposition of A&S employee Vita Choi; and (2) compel compliance with  
9 documents and testimony subpoenas issued to third party/closely related entity Spot.Me. See Dkt.  
10 Nos. 85-86. Defendants and Spot.Me, all of whom share counsel, responded by letter to the Court  
11 on June 28. See Dkt. No. 87. Defendants and Spot.Me argue that Adobe's letters to the Court are  
12 untimely because Adobe waited to serve discovery and bring these disputes to the Court, and is  
13 not in compliance with Judge Armstrong's requirement that the parties schedule discovery so that  
14 motions could be resolved before June 23. It appears that Defendants may have delayed in  
15 completing discovery due to an erroneous assumption that Judge Armstrong would grant their  
16 motion for leave to amend the complaint and modify the case schedule, but Judge Armstrong  
17 denied the motion for leave to amend on June 20.

18 While there is some merit to Defendants' timeliness argument, Adobe's letters were filed  
19 on the date of the cutoff whereas Defendants did not respond for five additional days. The Court  
20 will not deny Adobe's requests as untimely, and proceeds to the merits.

21 **II. Adobe's Request to Compel Deposition of A&S Employee Vita Choi (Dkt. # 85)**

22 Adobe seeks to compel the appearance of A&S employee Vita Choi at a deposition. On  
23 June 10, Adobe served a deposition notice on Defendants' counsel to take Choi's deposition on  
24 June 20. On June 17, A&S asked Adobe explain why no subpoena was required. Adobe  
25 responded that Mr. Lin previously testified that Choi is an employee and the "office manager" of  
26 A&S, and additionally she is named as the secondary contact on an agreement between Adobe and  
27 A&S that is at issue in this litigation. Adobe argues that it need not subpoena an officer, director  
28 or managing agent of a of a defendant corporation such as A&S. See Cadent Ltd. v. 3M Unitek

1 Corp., 232 F.R.D. 625, 628, n.2 (C.D. Cal. 2005) (quoting Schwarzer, Tashima & Wagstaffe,  
2 California Practice Guide: Fed. Civil Procedure Before Trial, §§ 11:1419, 11:2226 (2005 rev.)  
3 (“Under Rule 30(b)(1), it is well recognized that ‘if the corporation is a party, the notice compels it  
4 to produce any ‘officer, director or managing agent’ named in the deposition notice. It is not  
5 necessary to subpoena such individual. The corporation risks sanctions—including default or  
6 dismissal—if the designated individual fails to appear.”).

7 A&S responds that Choi is not an officer, director or managing agent and is actually a  
8 “book keeper” who must be served with a subpoena. A&S argues that the burden is on Adobe to  
9 prove otherwise. See Calderon v. Experian Info. Sols., Inc., 287 F.R.D. 629, 632-33 (D. Idaho  
10 2012), *aff’d*, 290 F.R.D. 508 (D. Idaho 2013). However, this burden is “a modest one, and at least  
11 at the discovery stage, all doubts are to be resolved in favor of the party seeking the depositions.  
12 This is particularly true where the party seeking discovery has had less than complete discovery on  
13 the issue of the witness's status within the corporation. Thus, courts have concluded that if there is  
14 at least a ‘close question’ as to the managing agent status of a potential witness, doubts should be  
15 resolved in favor of allowing the deposition, with the final determination of whether the agent has  
16 the ability to bind the corporation to be left for trial.” Id. (internal citations omitted).

17 Adobe contends that, regardless of title, Choi is a managing agent for purposes of this  
18 deposition given her involvement with A&S and the agreement at issue in this litigation, and does  
19 not need to be subpoenaed. See Botell v. United States, No. 2:-11-CV-1545 GEB, 2013 WL  
20 360410, at \*4-5 (E.D. Cal. Jan. 29, 2013) (internal citations omitted) (analysis of whether  
21 employee is managing agent for purposes of deposition requires consideration of several factors  
22 including: “(1) whether the individual is invested with general powers allowing him to exercise  
23 judgment and discretion in corporate matters; (2) whether the individual can be relied upon to give  
24 testimony, at his employer's request, in response to the demand of the examining party; (3)  
25 whether any person or persons are employed by the corporate employer in positions of higher  
26 authority than the individual designated in the area regarding which information is sought by the  
27 examination; (4) the general responsibilities of the individual respecting the matters involved in  
28 the litigation”). A&S counters that Choi is not a managing agent merely because she can receive

1 notice relating to a corporate agreement.

2         Given Adobe's minimal burden, and the fact that there is no dispute that Choi is at least the  
3 the office manager of A&S and has some relationship with the agreement between A&S and  
4 Adobe at issue in this litigation, there is at least a "close question" whether Choi is a managing  
5 agent such no subpoena is required to take her deposition. A&S is hereby Ordered to produce  
6 Choi for deposition within two weeks from the date of this Order.

7 **III. Adobe's Request to Compel Testimony and Documents From Spot.Me (Dkt. # 86)**

8         Adobe seeks to compel third-party Spot.Me's compliance with subpoenas for testimony  
9 and documents. Upon service of the subpoenas, counsel for Spot.Me -- the same counsel  
10 representing defendants A&S and Mr. Lin in this litigation -- objected to the subpoenas and stated  
11 that Spot.Me would not appear or produce documents but did not move the Court for a protective  
12 order or take any other action to avoid compliance with the subpoenas.

13         It appears to be undisputed that Defendant A&S and Spot.Me use the same mailing address  
14 in California and Nevada, Defendant Mr. Lin is the managing agent of both companies, both  
15 companies operate under the dba "TRUSTprice," and both companies use the same PayPal  
16 account. Thus, according to Adobe, they are operated by Mr. Lin as a single entity and its  
17 subpoenas for documents and testimony to Spot.Me are proper. The Court agrees that some  
18 discovery from Spot.Me is appropriate, and the question is one of scope.

19         Spot.Me/Defendants did not respond to Adobe's discovery letter on this issue until June  
20 28, after the parties had the benefit of the Court's June 27 Order with respect to the A&S  
21 deposition notice. See Dkt. Nos. 87, 89. With respect to the document subpoena, the subpoena  
22 included 15 categories of documents relating to Spot.Me's communications and dealings with  
23 A&S. Spot.Me states that it has now produced all of its sales records for Adobe Acrobat products  
24 from May 21, 2011 to present. It is unclear whether this production resolves this dispute. If there  
25 is still some remaining dispute over Spot.Me's document production, the parties are ordered to  
26 meet and confer and Spot.Me shall produce any additional documents prior to the deposition of  
27 Mr. Lin set for July 11.

28         With respect to the deposition subpoena to Spot.Me, the parties have agreed to complete

1 the deposition of Mr. Lin individually and as the 30(b)(6) witness for A&S and Spot.Me on July  
2 11. Notably, the deposition subpoena to Spot.Me contains 85 topics that appear to be similar to  
3 the topics listed in the Rule 30(b)(6) deposition notice to A&S which is the subject of the Court's  
4 prior Order. The parties shall apply the Court's guidance, provided with respect to how to  
5 properly narrow the scope of the A&S deposition notice, to the Spot.Me subpoena and proceed  
6 with the Spot.Me deposition accordingly.

7  
8 **IT IS SO ORDERED.**

9 Dated: June 30, 2016

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12 ELIZABETH D. LAPORTE  
13 United States Magistrate Judge  
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United States District Court  
Northern District of California